STATE OF MICHIGAN
IN THE SUPREME COURT

JUSTINE MALDONADO,

Plaintiff-Appellee,

-vs-

FORD MOTOR COMPANY,

Defendant-Appellant.

Supreme Court Case No. 126274

Court of Appeals Case No. 243763

Wayne County Circuit Court
Case No. 00-018619-NO

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT FORD MOTOR COMPANY

I. INTRODUCTION

In its Application, Defendant-Appellant Ford Motor Company ("Ford") presented to this Court the issue of a trial court's inherent authority to impose sanctions, including dismissal, where a party and her counsel persist in egregious and flagrant misconduct intended to interfere with their opponents' fair trial rights. In its opinion reversing the trial court's exercise of that authority, the Court of Appeals violated longstanding principles governing the inherent authority doctrine and created a new and unworkable standard. The Court of Appeals opined that dismissal is precluded unless it is proved that the misconduct achieved its wrongful objective and "actually tainted" the jury venire. Such a standard would paralyze the trial courts, rendering them unable to fulfill their duty to preserve the integrity of the judicial process. It would undermine the rule of law. It cries out for peremptory reversal.

Plaintiff and her counsel made a premeditated strategic decision to thwart the trial court's rulings and prejudice Defendants' fair trial rights. If the trial court was going to exclude evidence Plaintiff and her counsel wanted to present at trial, they decided, then they would find another way to get that evidence in front of the jury. The trial court's ruling that Ford and Co-Defendant Daniel Bennett ("Mr. Bennett") would be denied a fair trial if the evidence was admitted was immaterial to Plaintiff and her counsel, other than to self-justify their decision that they – not the trial court – would control the trial proceedings. That is the course Plaintiff and her counsel charted, and that is the course they followed.

Plaintiff confirmed to the general public this plan between her and her counsel. Just days after she and her counsel heard the trial court's warning that it would dismiss the lawsuit if it concluded anyone was attempting to publicize the excluded evidence,

Plaintiff and her counsel flouted the ruling on the local television news. Holding a press conference and passing out leaflets detailing the excluded evidence, Plaintiff, with her counsel at her side, dared the trial court to even try to exert control:

> If we don't act the way [Judge Giovan] wants it, the way he sees fit, then he'll dismiss my case with prejudice. And what he doesn't know is, it doesn't bother me . . . .

(Appendix, Tab B at 6).[1]

Plaintiff and her counsel literally declared war on the trial court's ruling, announcing that they would publicize the excluded evidence and that Plaintiff would decide for herself what "justice" required. No one was going to wrest from them control over the "administration of justice" in their case. It was under these circumstances that Judge Giovan concluded that nothing short of dismissal could protect the integrity of the judicial system against intractable misconduct.

In its order dated December 28, 2004, this Court directed "oral argument on whether to grant [Ford's] application or take other peremptory action permitted by MCR 7.302(G)(1)" and advised the parties to "include among the issues to be addressed

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[1] Plaintiff implied in her media statement that the trial court had instructed her to stop talking about sexual harassment in general. That is the "free pass" she and her counsel argue should excuse their misconduct. But there is no such free pass, because no one – not Judge Giovan, Ford, nor Mr. Bennett – ever even suggested that Plaintiff should not talk to the media about what happened to her or about sexual harassment in general. Every mention of publicity involved only Plaintiff's and her counsel's efforts to publicize the excluded evidence. (Appendix, Tab B at 8-9; Tab M at 94-95, 102-124; Tab R at 29-34). Indeed, Plaintiff had confirmed in her deposition taken just three days earlier that she knew that what everyone was "whining" about was her continued efforts to publicize the excluded evidence. (Appendix, Tab I at 981). Plaintiff's counsel could not and did not deny they distributed leaflets detailing the excluded evidence during the press conference outside Ford World Headquarters. Rather, Plaintiff's counsel repeatedly attempted to divert the court's attention to leafleting the next day, at the Wixom Plant, an event where she claims neither she nor Plaintiff distributed leaflets. (Appendix, Tab M at 102, 111-112).

whether the Court of Appeals erred in reversing the Wayne Circuit Court's dismissal of the case." The trial court's dismissal of the case under the inherent authority doctrine is especially suitable for peremptory action by this Court. This is a truly extraordinary case involving a campaign of litigant and attorney misconduct calculated to poison the jury venire by exposing as many potential jurors as possible to unfairly prejudicial evidence that had been ruled inadmissible.

The trial court did everything required of it under the inherent authority doctrine before resorting to dismissal. Plaintiff and her counsel were expressly warned that their continuing misconduct and attempts to influence the jury venire would result in dismissal. (Appendix, Tab R at 30). When they persisted, the trial court began a hearing that spanned two days, and found, based on the hearing record, that Plaintiff and her counsel had intentionally engaged in misconduct for the purpose of interfering with their opponents' fair trial rights. (Appendix, Tab B at 12; Tabs M-N). Relying on Plaintiff's own public and sworn acknowledgments that nothing the trial court could do would stop her misconduct, the trial court held that a lesser sanction would not adequately protect the integrity of the judicial process. (Appendix, Tab B at 3-6).

Despite the trial court's careful attention to process, the Court of Appeals criticized the trial court for failing to hold an evidentiary hearing, for failing to determine whether Plaintiff and her counsel had acted intentionally, and for failing to consider whether a lesser sanction would adequately protect the integrity of the judicial process. The trial court had done all of these things. What is more, the appellate panel appeared confused over the inherent authority doctrine itself, with both the majority and the concurring opinions implying that the doctrine required a violation of a court order.

While paying lip service to the discretion entrusted to a trial court, the Court of Appeals substituted its own judgment rather than reviewing for an abuse of discretion.

Juxtaposing the trial court's opinion against the Court of Appeals' decision, it is evident that the trial court fully understood and correctly applied the inherent authority doctrine -- while the Court of Appeals did not. In extraordinary cases such as this one, a trial court must have the ability to impose extraordinary sanctions, including dismissal, if the integrity of the judicial process – in the case before it and in future cases – is to be honored and preserved.

The same can be said of the second issue raised in Ford's Application: the Court of Appeals' disenfranchisement of the trial court's discretion to make evidentiary rulings in the context of a trial. If this Court peremptorily reverses the Court of Appeals on the dismissal under the inherent authority doctrine, this second issue (involving an unpublished evidentiary ruling) becomes moot. But if the Court does not peremptorily reverse or grant the Application with respect to the inherent authority doctrine, Ford respectfully requests that the Court peremptorily reverse or grant leave on this evidentiary point that is recurring and crucial in sexual harassment litigation under the Elliott-Larsen Civil Rights Act.

II. ANALYSIS

A. The Court of Appeals Erred By Not Applying An Abuse of Discretion Standard to The Trial Court's Dismissal Ruling.

This Court has long respected a trial court's inherent authority to dismiss a case when the circumstances warrant, and has consistently reviewed the exercise of this inherent authority under an abuse of discretion standard. Banta v Serban, 370 Mich 367, 369-370; 121 NW2d 854 (1963). The United States Supreme Court has similarly

endorsed a trial court's discretion to exercise its inherent authority, holding that "[a] primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." Chambers v NASCO, 501 US 32, 44-45; 111 S Ct 2123; 115 L Ed2d 27 (1991). "[O]utright dismissal of a lawsuit . . . is a particularly severe sanction, yet it is within the court's discretion." Id, 501 US at 45.

The Court of Appeals paid lip service to the abuse of discretion standard but did not apply it. As this Court has observed, "[e]stablishing such an abuse is difficult." Dacon v Transue, 441 Mich 315, 328; 490 NW2d 369 (1992). It is difficult because an abuse occurs only "when the decision is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" Id, 441 Mich at 329 (quoting Spalding v Spalding, 355 Mich 382, 384-385; 94 NW2d 810 (1959)). Here, the Court of Appeals acknowledged there was no passion or bias or perversity in the trial court's actions. To the contrary, the panel majority concluded that "nothing in the record indicates that Judge Giovan acted with prejudice or impropriety." (Appendix, Tab A at 10). Nor was there any suggestion that the trial court violated fact or logic. Rather, after reviewing the evidence and giving Plaintiff and her counsel ample opportunity to present their own evidence (or to explain or even deny their misconduct), the trial court came to the overwhelmingly logical conclusion that Plaintiff's and her counsel's behavior was –

> Intentional, premeditated and intransigent. It was designed to reach the farthest boundaries of the public consciousness. It should be presumed to have had its intended effect.

(Appendix, Tab B at 12). Nevertheless, acting as a Monday morning quarterback, the appellate judges said that Judge Giovan abused his discretion.

By not genuinely applying the abuse of discretion standard, the Court of Appeals inflicted an injustice not only on this trial court and the parties to this case, but on judges and litigants in other trial courts as well. There is a time-tested and proven reason for entrusting discretion to the trial court:

> We have held repeatedly, and we again hold, that we will not interfere with the discretion of the trial chancellor in these cases unless a clear abuse thereof is manifest in the result reached below. The kind of determination before us requires a weighing of human and economic factors of the utmost complexity, a weighing that can best be accomplished at the local level, not in [appellate] chambers.

Spalding v Spalding, supra, 355 Mich at 384. See also Marrs v Board of Medicine, 422 Mich 688, 694-695; 375 NW2d 321 (1985) (Court of Appeals' disagreement as to appropriate discipline was error; appellate court "had no authority to substitute what it believed to be the sounder sanction").

The Court of Appeals' substitution of own judgment, from its own chambers, is a phenomenon well known in court systems throughout this nation, and is one the courts are duty-bound to resist. As the United States Supreme Court observed of the Third Circuit's wrongful reversal of a trial court's dismissal under Federal Rule of Civil Procedure 37, under circumstances similar to those present here:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction . . . .
>
> But here, as in other areas of the law, the most severe in the spectrum of sanctions . . . must be available to the district court in appropriate cases, not merely to penalize those

> whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts. Under the circumstances of this case, we hold that the District Judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents' "flagrant bad faith" and their counsel's "callous disregard" for their responsibilities. Therefore, the petition for a writ of certiorari is granted and the judgment of the Court of Appeals is reversed.

National Hockey League v Metropolitan Hockey Club Inc, 427 US 639, 642-643; 96 S Ct 2778; 49 L Ed2d 747 (1976).

In the present case, the trial court received evidence and asked pointed questions during a two-day hearing. (Appendix, Tabs M-N). Prior to this hearing, the trial court had spent countless hours in other pretrial hearings and in chambers conferences in which many of these issues were discussed and argued at length. (See e.g. Appendix, Tab M at 94-95, 102-124; Tab R at 29-34). Under these circumstances, the trial court -- not the Court of Appeals -- was plainly in the best position to weigh the evidence and evaluate the full extent of the misconduct. The Court of Appeals reviewed only examples of the misconduct recited on a paper record. It then failed to resist the "natural tendency" of appellate courts to conclude in abstract hindsight that dismissal is always too severe a sanction. National Hockey League, supra, 427 US at 642. It rendered a disposition of its own, which an appellate court may not do under the abuse of discretion standard. Simply put, the Court of Appeals "had no authority to substitute"

its judgment, rendered from distant appellate chambers, for that of the trial court. Marrs, supra, 422 Mich at 694-695.

B. The Court of Appeals Ignored Existing Legal Standards And Created An Impossible Test For The Inherent Authority Doctrine.

The Court of Appeals not only ignored the abuse of discretion standard, it also ignored the established test for evaluating litigant misconduct and adopted a new and totally unworkable "actual taint" test. And it inexplicably criticized the trial court for not undertaking the "due process" protections that the trial court had in fact meticulously undertaken. In other words, the Court of Appeals took a free fall into the "natural tendency" of appellate courts to reflexively reverse dismissal orders for misconduct. National Hockey League, supra, 427 US at 642. In so doing, it impliedly endorsed the flouting behavior of Plaintiff and her counsel and invited "other parties in other lawsuits" to engage in equally egregious misconduct. Id, 427 US at 643.

In reviewing misconduct of this nature, the courts have relied on a two-part test that examines the litigant's (and/or her counsel's) intent and the nature of their conduct, balancing the "harshness of the sanction . . . against the gravity of plaintiff's misconduct." Cummings v Wayne County, 210 Mich App 249, 253; 533 NW2d 13 (1995). To find misconduct warranting dismissal, the trial court must afford the plaintiff due process, meaning "notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker." Id. The opportunity to be heard need not be "a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence." Id. See also Methode Electronics Inc v Adam Technologies Inc, 371 F3d 923, 928 (CA 7, 2004) ("In

order to sanction a party under its inherent power, a court must provide notice of its intention to impose sanctions and give the party an opportunity to respond").

Where misconduct intended to abuse the judicial process is found, dismissal is a sanction that the trial court, in the exercise of its discretion, may impose. Cummings, supra, 210 Mich App at 252-253. As summarized in Ford's Application (pages 27-28), there is ample case law supporting this test. Over the many decades it has been applied, the test has prove adequate to protect against arbitrary and ill-considered dismissals, limiting that sanction to the rare situation where there actually has been egregious misconduct that threatens the integrity of the judicial process.

The Court of Appeals ignored this test in favor of a new test it created – one that it would have applied had it been the trial court. This new test – requiring proof that Plaintiff and her counsel actually succeeded in tainting the jury venire – is an altogether unworkable and impossible test. Plaintiff's own authorities acknowledge that "actual taint" can never be proven. See e g Chemerinsky, Silence Is Not Golden: Protecting Lawyer Speech Under The First Amendment, 47 Emory LJ 859, 881-882 (1998) (actual taint cannot be proven because "it is impossible to try the case to two juries, one of which has been exposed to publicity and one that has been totally shielded"). The inherent implausibility of this standard is shown by the Court of Appeals' remedy: that the case be remanded to the trial court for Ford to prove today that a jury panel called two years ago could not have been fair and impartial to Ford and Mr. Bennett in 2002.

Gentile v State Bar of Nevada, 501 US 1030; 111 S Ct 2720; 115 L Ed 2d 888 (1991), on which the Court of Appeals relied, does not support the "actual taint" test. The United States Supreme Court held in Gentile its "substantial likelihood of material

prejudice" test was satisfied by "comments that were likely to prejudice the jury venire; even if an untainted panel can ultimately be found." 501 US at 1075 (emphasis added). Under Gentile, Plaintiff's and her counsel's publication of evidence they knew was inadmissible at trial because of its grossly unfairly prejudicial nature more than satisfied the "substantial likelihood" test. Id at 1070.

In reflexively yielding to the "natural tendency" to reverse, the Court of Appeals incorrectly and unjustly criticized Judge Giovan for not providing a "due process" hearing and for not considering whether a lesser sanction would adequately address the misconduct. The trial court did both. Plaintiff and her counsel had ample opportunity "to know and respond to the evidence." Cummings, supra, 210 Mich App at 253. During a two-day hearing, the trial court considered all proffered evidence. It posed questions and gave everyone involved the opportunity to be heard. Plaintiff and her counsel at times refused to respond, likening the hearing to an inquisition into their "Communist Party" affiliation and their judicial voting record. (Appendix, Tab M at 114-117). However, these snide obfuscations in no way deprived Plaintiff or her counsel of due process.[2]

The trial court also considered whether a lesser sanction would deter future misconduct. Based on Plaintiff's own statements that nothing would stop her from publicizing the inadmissible evidence, the trial court came to the overwhelmingly logical conclusion that a lesser sanction would be ineffective as a deterrent in this case and in future cases as well. As the trial court carefully outlined in its opinion, Plaintiff, immediately after the court expressly warned that publicizing the excluded evidence

[2] The trial court also permitted the parties to file post-hearing briefs, giving Plaintiff an additional opportunity to respond to the evidence. (Appendix, Tab N at 47).

would result in a dismissal, testified in deposition and announced on television that she was still publicizing (and intended to continue publicizing) the excluded evidence, and neither the trial court nor even a criminal statute would stop her. (Appendix, Tab B at 3-6).

If allowed to stand, the Court of Appeals' ruling would sound a death knell for all trial courts that encounter intransigent litigants and counsel determined to wrest from the trial court its right and duty to control the administration of justice. These courts will find themselves hamstrung, without discretion to act, even where misconduct is intentional, flagrant, calculated and unrelenting. Immediate and harsh consequences are necessary and deserved in those rare circumstances. Trial courts must have the power to act without fear that, years later and from distant chambers, appellate judges reviewing a paper record will succumb to the "natural tendency" to reflexively reverse misconduct dismissals.

At the same time, the Court of Appeals gives a green light to those litigants and their counsel who seek a tactical advantage solely through abuse of the judicial process. The integrity of the judicial process deserves better. The Court of Appeals' decision on the dismissal issue is ripe for peremptory reversal.

C. Apart From The Dismissal Issue, The Court of Appeals' Evidentiary Ruling on Plaintiff's "Propensity" Witnesses Was Erroneous And Should Be Reversed.

The Court of Appeals' erroneous evidentiary ruling will be moot if this Court peremptorily reverses on the dismissal issue. However, the evidentiary issue is also worthy of peremptory reversal or consideration on leave granted.

The Court of Appeals ruled that the trial court had to admit testimony of four Ford employees and a contractor's employee in any trial of this case. These witnesses

intend to testify that Mr. Bennett approached each of them in a sexual manner and that Mr. Bennett accordingly had a "propensity" to engage in sexual misconduct in the workplace. According to the Court of Appeals, the trial court must admit this testimony so that Plaintiff can "show that Ford had notice of Bennett's sexual harassment." (Appendix, Tab A at 9).

The trial court had rejected Plaintiff's argument that this evidence was relevant to notice because it was uncontroverted that no witness complained to Ford until after Mr. Bennett allegedly sexually harassed Plaintiff. (Appendix, Tab R at 43-46; Exhibit AA, 05/17/02 Hearing Transcript, at 20-22). Because the trial court concluded that "notice" could not be a proper purpose under MRE 404(b),[3] it did not reach the MRE 403 issue of whether the impact of these five propensity witnesses, even if somehow pertinent to notice, might be unduly prejudicial or confusing to the jury.

In summarily reversing the trial court, the Court of Appeals clearly erred in two respects. First, it erred in concluding that this after-the-fact evidence was legally relevant to notice concerning Plaintiff's work environment. Second, it improperly arrogated to itself the first-line responsibility of the trial court to evaluate probative evidence versus prejudicial impact or jury confusion in the evolving context of a trial. MRE 403.

The Court of Appeals' characterization of this evidence as somehow being "notice" to Ford that Mr. Bennett was sexually harassing Plaintiff stretches the concept of "notice" beyond recognition. It also obfuscates the line between what Ford knew in

[3] Plaintiff argued in her Cross-Application to this Court that there were other proper purposes under MRE 404(b) for admitting the evidence. Because the Cross-Application is not currently before the Court, Ford does not address those arguments here.

1998, when Plaintiff claims Mr. Bennett allegedly harassed her, and what Ford first heard in subsequent litigation -- after the harassment had ended and after Ford had already removed Mr. Bennett from the workplace. Plaintiff reluctantly admitted that none of these witnesses complained to Ford until after Mr. Bennett allegedly sexually harassed Plaintiff. (Exhibit AA at 20-22). Moreover, not one of them worked in Plaintiff's work environment; they worked elsewhere in the sprawling Wixom Plant infrastructure. And each of the propensity witnesses admitted that no one witnessed Mr. Bennett's alleged misconduct toward them, so no one else could have reported such conduct to Ford. Yet the Court of Appeals opined that this after-the-fact evidence said something about whether "Ford had notice of Bennett's sexual harassment under the 'totality of the circumstances' known to Ford." (Appendix, Tab A at 9). The Court of Appeals' timing is backwards. Moreover, it cannot be squared with Chambers v Trettco Inc, 463 Mich 297; 614 NW2d 910 (2000), in which this Court focused the notice inquiry on what the employer knew of a plaintiff's work environment at a time when it could take prompt remedial action, 463 Mich at 312-313, not what it subsequently learned through litigation.

Even more obvious and blatant, in purporting to conduct its own MRE 403 balancing, the Court of Appeals improperly took from the trial court its discretion to make evidentiary rulings in the context of a trial. As this Court recently affirmed,

> We review a trial court's decision to admit or exclude evidence for an abuse of discretion. . . . [A]ny error in the admission or exclusion of evidence will not warrant appellate relief "unless refusal to take this action appears . . . inconsistent with substantial justice," or affects "a substantial right of the [opposing] party."

Craig ex rel Craig v Oakwood Hosp, 471 Mich 67, 76; 684 NW2d 292 (2004) (citations and footnotes omitted). This discretion is vested in the trial court because it is that court that "has the responsibility to control the introduction of evidence and the arguments of counsel and limit them to relevant and material matters." Tobin v Providence Hosp, 244 Mich App 626, 640; 624 NW2d 548 (2001). This same standard applies to post-trial review of a trial court's exclusion of evidence *in limine*. Pena v Ingham County Road Comm'n, 255 Mich App 299, 308-309; 660 NW2d 351. There can be no reasoned explanation why a lesser standard should apply to an *in limine* order that has not stood the test of a trial.

The Court of Appeals disenfranchised the trial court from exercising its customary function (and duty) under MRE 403 to balance probative value against prejudice or confusion in the context of a trial. The appellate court assumed for itself the authority to hypothesize both the probative value of discrete items of evidence to be admitted at trial and the danger of unfair prejudice or confusion of the jury. The Court of Appeals' pre-trial holding that the "probative value of this evidence is not substantially outweighed by the danger of unfair prejudice to defendants or confusion of the issues" (Appendix, Tab A at 9) has no factual basis in the record and is not authorized by law. How can one possibly judge that except in the context of a trial?

The propensity evidence all involves unproven and untested allegations that would confuse the jury regarding whose case is being tried, and would certainly unfairly prejudice Ford if the jury concludes Mr. Bennett did something inappropriate to anyone, whether or not it was Plaintiff. The Court of Appeals' ruling leaves Ford with no choice other than to conduct a series of mini-trials over these unconnected claims, or forego an

adequate defense. See Sims v Mulcahy, 109 F3d 524, 531 (CA 7, 1990) (trial court properly excluded co-worker testimony that "would have effectively required a 'trial within a trial'"); Haskell v Kaman Corp, 743 F2d 113, 122 (CA 2, 1984) (reversing jury verdict where trial court allowed parade of propensity witnesses in violation of FRE 403).

The evidence needed to rebut the type of "he said-she said" allegations these propensity witnesses would offer cannot be presented without extensive factual development. Another case pending before this Court involving Ford and Mr. Bennett, Elezovic v Ford Motor Co, Supreme Court No 125166, illustrates this point. Ms. Elezovic's allegations against Mr. Bennett, "contemporaneously" documented by her "psychologist," had some superficial credibility. Those claims unraveled, however, when Ms. Elezovic's psychologist confessed to having altered her records well after the fact, and after Ms. Elezovic herself stipulated to her own untruthful testimony under oath. Uncovering these critical admissions, however, took more than a year of discovery, followed by three weeks of trial and retention of key experts. To undertake this process with respect to five propensity witnesses is a burden no defendant should have to bear and no jury should have to unravel.

III. RELIEF REQUESTED

The Court of Appeals' cavalier evidentiary ruling, like its ruling on the trial court's dismissal under the inherent authority doctrine, is ripe for peremptory reversal. However, if the Court is not inclined to peremptorily reverse, the issues raised here are

of such substantial importance to this State's jurisprudence, and the Court of Appeals' errors are so clear, that a full grant of leave on Ford's Application is warranted.

Respectfully submitted,

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Dated: January 25, 2005